Wehrenberg Theatres, Inc. d/b/a Melba Theatre and Skyvue Drive-In and Local 143, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada. Case 14-CA-14498

February 9, 1982

### **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On April 21, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.<sup>2</sup>

The Administrative Law Judge found, inter alia, that Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee, Richard Hollander, on November 20, 1980. Although in reaching this finding, the Administrative Law Judge omitted certain facts pertinent to a consideration of Respondent's conduct, we agree with the Administrative Law Judge's conclusion that Respondent unlawfully discharged Hollander.

Respondent operates a number of movie theaters in the St. Louis, Missouri, area. Involved in this proceeding are its Melba Theatre and its Skyvue Drive-In, located in De Soto, Missouri. The Melba Theatre, an indoor facility, customarily operated between September and May. The Skyvue Drive-In generally opened in March and closed between September and November.

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Throughout the year, Respondent normally employed three projectionists. During the spring and fall overlap periods, there were generally 15 projectionist shifts. Claude Pierce, an admitted supervisor, worked six shifts per week at the Melba Theatre. A second projectionist worked at the Melba during Claude Pierce's day off and also took four to five weekly shifts at the Skyvue Drive-In. The third projectionist worked two to three weekly shifts at the Skyvue Drive-In. During the period when only one theater was open, Claude Pierce generally worked six shifts and the two remaining projectionists alternately worked during Claude Pierce's day off. In early 1980, prior to the Skyvue Drive-In's reopening, Respondent employed Claude Pierce as its primary projectionist and supervisor. Claude's sons, Ron and Mike, were the second and third projectionists.

In the summer of 1980,3 Respondent broke with tradition and did not close the Melba Theatre. It kept the theater open for a showing of the popular film "The Empire Strikes Back." Throughout this period, the Skyvue Drive-In was also open. When combined, the numerous daily showings of "The Empire Strikes Back" and the customary evening showings at the Skyvue Drive-In produced 21 projectionist shifts. To handle the increased workload, Claude Pierce hired Keith Singer in June, when the special film showing began. Throughout the summer, Singer worked with Claude Pierce at the Melba Theatre. In September, Singer returned to college. When he left, Respondent did not terminate him and it was understood that, when Singer returned for weekends, he could request to work at the theaters.

At the Skyvue Drive-In, Ron Pierce was the primary projectionist during the summer of 1980. He generally worked all seven shifts a week. Mike Pierce, the second projectionist, worked only when Ron could not. Sometime in the late summer, Mike Pierce informed Claude Pierce that he no longer wanted to work at the theaters and would come in only if an emergency warranted it. Thereafter, Richard Hollander asked Claude Pierce for a job. In September, Pierce hired Hollander, and Mike Pierce stopped working at the theaters. At this time, "The Empire Strikes Back" was still showing at the Melba Theatre, and the Skyvue Drive-In was also still open. From his hire until his discharge in mid-November, Hollander worked approximately three shifts per week at the Skyvue Drive-In.4

<sup>&</sup>lt;sup>2</sup> For the reasons set forth in his dissenting opinions in *Toyota Midlown*. *Inc.*, 233 NLRB 797 (1978), and *Pargus of Crescent Cay. Inc.* 194 NLRB 616 (1971). Member Jenkins would not include Ron Pierce in the unit. Finding, as a result, only one employee remaining in the unit, Member Jenkins would not join his colleagues in finding that Respondent violated Sec. 8(a)(5) of the Act when it refused to bargain with the Union, nor would he issue a bargaining order (See Sonoma-Murin Publishing Co., 172 NLRB 625 (1968).) He does, however, agree with the 8(a)(3) violation found in this proceeding, and would issue a bargaining order if he considered Ron Pierce to be included in the unit.

<sup>&</sup>lt;sup>3</sup> All dates are in 1980 unless it is otherwise indicated.

<sup>&</sup>lt;sup>4</sup> Claude Pierce testified that, when he hired Hollander, he did not tell him that his job would last only through the fall of 1980. Pierce testified

On October 16, Claude Pierce and his son, Ron, met with a representative of the Charging Party Union and signed authorization cards. Claude Pierce left a blank authorization card for Richard Hollander, who signed it on October 18 in Ron Pierce's presence.<sup>5</sup> By letter dated Octer 22, the Union demanded recognition by Respondent. Respondent rejected the Union's request in a letter dated November 6.

On two occasions early in November, Claude Pierce met with Respondent's vice president, A. R. Parker, in St. Louis. Parker told Pierce to "get rid" of Richard Hollander when he closed the Skyvue Drive-In for the winter. On November 16, Claude Pierce closed the Skyvue Drive-In. At the time the drive-in closed, Claude Pierce disregarded Parker's instruction and began scheduling Hollander for work at the Melba Theatre. Ron Pierce was also to work at the Melba Theatre. On November 20, a special courier from Respondent's St. Louis office delivered an envelope to Claude Pierce. Pierce had never before received correspondence from Respondent delivered in this manner. The envelope contained a note from Vice President Parker which directed Pierce to sign the enclosed letter addressed to Richard Hollander.<sup>6</sup> Pierce did not sign the letter; instead, he handed it to Hollander and said he did not agree with it. The letter stated, inter alia, that Hollander was separated from Respondent's employ, and that no commitment as to future hiring could be made. This was the first time in the 18 years that Claude Pierce had managed the De Soto theaters that a projectionist had been laid off or terminated.

Following Hollander's separation, Respondent employed only Claude and Ron Pierce at the De Soto theaters, although, as noted, it was Respondent's practice in the past to employ three projectionists throughout the year. In situations where neither Claude nor Ron Pierce could work, Respondent could not call on Keith Singer, who, during this period, was generally away at college.

Singer worked only when he came home to visit. That fall, he worked on a few weekends and during his Christmas vacation. Nor could Respondent depend on Mike Pierce's assistance; even when called on in an emergency during the months following Hollander's dismissal, Mike Pierce sometimes refused to work. After Hollander's dismissal, Mike worked only a few times during the month of December.

Based on the above, we conclude that Respondent discharged Richard Hollander in retaliation for the employees' support for the Union, and not, as Respondent contends, because Respondent had closed the Skyvue Drive-In for the winter and needed to reduce the number of projectionists it then employed. Respondent does not dispute that it had traditionally employed three projectionists at the De Soto theaters, and that it had never before ordered the dismissal of one of its projectionists. Instead, Respondent has asserted that at the time it ordered Claude Pierce to dismiss Hollander it employed five projectionists at the De Soto theaters and sought, by discharging its newest hiree, Hollander, to return to the traditional three employees. Respondent asserts, too, that it had hired Hollander to help with the extra shifts created by the special showing of "The Empire Strikes Back." When this movie ceased playing, Respondent argues, the reason for Hollander's employment ceased also.

The facts, as described above, however, establish the pretextual nature of Respondent's contention that it dismissed Hollander for business reasons. Contrary to Respondent's assertion, it effectively employed only three projectionists in De Soto before it fired Hollander. As indicated above, neither Keith Singer nor Mike Pierce was a reliable backup projectionist during the fall and winter months of 1980. Following Hollander's discharge, only two projectionists, Claude and Ron Pierce, remained. They received only minimal assistance from Mike Pierce and Keith Singer. It is noted that Respondent contends that its aim was to return its projectionist staffing to its customary level of three; Respondent has not contended that it sought to reduce the number of employees to less than the number it traditionally employed. That Hollander's dismissal left only two projectionists renders Respondent's contention implausible. Moreover, the timing of Hollander's and Singer's hiring demonstrates that Respondent hired Singer, not Hollander, to cover the added work which resulted from "The Empire Strikes Back" showings; Respondent hired Richard Hollander, instead, to fill the position held by Mike Pierce, who no longer wanted to work at Respondent's theaters.

that he thought he told Hollander that Hollander might work at the Melba Theatre when the Skyvue Drive-In closed for the winter. Hollander testified that Claude Pierce told him when he was hired that, when the drive-in closed, depending on the amount of time Ron Pierce wanted to work, Hollander might work 1 night a week at the Melba Theatre. The Administrative Law Judge did not pass on this testimony.

<sup>5</sup> The Administrative Law Judge found, and we agree, that Claude Pierce's involvement in the securing of the authorization cards did not taint the Union's majority support reflected by the cards.

<sup>6</sup> The envelope sent to Claude Pierce also included a letter to Claude Pierce which described Ron Pierce as an "Assistant Manager" and stated various alleged supervisory duties possessed by such "Assistant Managers." The Administrative Law Judge found, and we agree, that Respondent's letter concerning Ron Pierce's alleged supervisory status merely reflects an attempt by Respondent to confer on Ron Pierce the appearance of such status in order to support his exclusion from the unit. As did the Administrative Law Judge, we reject Respondent's attempt to deny Ron Pierce employee status.

Respondent's otherwise unexplained break with its tradition of not discharging projectionists at a season's close, a change in its practice which rendered its De Soto theaters comparatively understaffed, can be explained only in light of the Union's recent request for recognition. Respondent's unprecedented direction that Claude Pierce dismiss Hollander, the manner in which Respondent communicated that direction to Pierce, and the dismissal's proximity in time to the Union's request for recognition indicate that Respondent was not acting to reduce its projectionist complement. These facts indicate instead that Respondent's dismissal of Hollander was in response to the Union's request for recognition. That Respondent sought to erode its employees' support for the Union after the Union had requested recognition is also illustrated by Respondent's letter to Claude Pierce which attempted to designate Ron Pierce as a statutory supervisor. As noted, Claude Pierce received this letter along with Hollander's illegal notice of termination.

Based on all the above, we conclude in agreement with the Administrative Law Judge that Respondent dismissed Richard Hollander soon after the Union's request for recognition in order to retaliate against its De Soto projectionists for their support of the Union and to erode the Union's support among its projectionists. We further conclude that, by such conduct, Respondent violated Section 8(a)(3) and (1) of the Act, and also that a bargaining order is warranted on the facts of this case as described by the Administrative Law Judge.<sup>7</sup>

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wehrenberg Theatres, Inc. d/b/a Melba Theatre and Skyvue Drive-In, De Soto, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership of our employees in or support of Local 143, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States and Canada (herein the Union), or any other labor organization, by discharging any of our employees or discriminating in any manner in respect to their hire and tenure of employment or any term or condition of employment, in violation of Section 8(a)(3) of the Act.

WE WILL NOT refuse to recognize or bargain collectively with the Union as the exclusive bargaining representative of all our employees in the unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment:

All projection employees employed by us at our De Soto, Missouri, Melba Theatre and Skyvue Drive-In facilities, excluding office clerical and professional employees, guards, and supervisors as defined in the Act and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL offer to Richard Hollander immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered, with interest.

WE WILL, upon request of the Union, bargain collectively with it as the exclusive representative of all of our employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WEHRENBERG THEATRES, INC. D/B/A MELBA THEATRE AND SKYVUE DRIVE-IN

<sup>&</sup>lt;sup>7</sup> In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

#### DECISION

#### STATEMENT OF THE CASE

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: Respondent Wehrenberg Theatres, Inc., a corporation duly authorized to do business under the laws of the State of Missouri, with its principal office and place of business in St. Louis, Missouri, is engaged in the retail moving picture business owning and operating numerous movie theaters in the vicinity of St. Louis and, in particular, the two theaters involved herein, Melba Theatre and Skyvue Drive-In, both located in De Soto, Missouri. During the 12 months preceding the issuance of the complaint, a representative period, Respondent in the course and conduct of its business operations derived gross revenues in excess of \$500,000 and rented and caused to be transported and delivered at its St. Louis, Missouri, place of business, films, goods, and materials valued in excess of \$50,000, of which films, goods, and materials were transported and delivered to its St. Louis place of business directly from points located outside the State of Missouri. I conclude, as Respondent admits, that it is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further conclude, as Respondent admits, that Charging Party Local 143, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States and Canada (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

On October 16, 1980,2 Claude Pierce, manager of both Melba and Skyvue and an admitted supervisor under Section 2(11) of the Act, and his son, Ron, met at the Union's office and signed cards authorizing the Union to represent them as their collective-bargaining representative. Claude brought a blank card back with him and left it for employee Richard Hollander, who signed the card on October 18 in Ron's presence and returned it to the Union. The Union's president, believing that the Union represented a majority of the projectionists at both theaters,3 demanded recognition from Respondent by letter dated October 22. By letter dated November 6, Respondent, by its attorney, replied that it doubted the Union's status as representative of "an uncoerced majority of employees in a unit appropriate for collective bargaining," and rejected the Union's request.

Shortly thereafter, as was customary because of cold and inclement weather, Skyvue, an outdoor theater, was closed for the winter on November 16; and on November 20, Claude gave to Hollander the following letter, which read (including typographical errors) as follows: I just wanted to confirm our discussion on your separation from our De Soto Theatre. I appreciate your work efforts and wish the job could have lasted longer, but that is something beyond anyones control. Likewise, I can't make any sort of commitment to you as to hiring. The best I can do is wish you the best of luck in the future and hope you find a replacement job quickly.

First, Respondent contends, without any explication. that Hollander was laid off, and not discharged, as the General Counsel alleges. The law is well settled that a discharge will be found if Respondent's letter "would logically lead a prudent person to believe his tenure has been terminated." Ridgeway Trucking Company, 243 NLRB 1048, 1049, fns. 5 and 6 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980). Here, the omission of the word "layoff" is obvious; and, although there is perhaps an inkling of future employment, the letter announced that Respondent could not make any commitment "as to hiring," not recall or reinstatement. Further, the letter implies a discharge in the word "separation" and in the wish that Hollander's "job could have lasted longer." There is nothing in the letter to indicate that Hollander would be rehired when Skyvue reopened in the spring. I find that the letter was intended to effectuate the discharge, not the layoff, of Hollander and was so interpreted by Claude.

Second, Respondent claims that there is no proof that Hollander's discharge violated Section 8(a)(3) and (1) of the Act. I find and conclude otherwise. It had never been a practice to lay off any projectionist in the 18 years that Claude managed the two theaters, and it was wholly unique for Respondent's vice president, A. R. Parker, to prepare the November 20 letter and to direct Claude to deliver it to Hollander. Because Parker did not testify, it may be inferred that there was no reason for his actions other than Hollander's union activities. Parker spoke with Claude after Respondent received the Union's demand for recognition<sup>4</sup> and told him to "get rid" of Hollander after Skyvue closed. Because the Union's demand was made only after Hollander had been hired in early September, Respondent could well have assumed, through a process of elimination involving at most four employees within the appropriate unit, that Hollander, its most recent employee, was part of the Union's claimed majority. And, in order to destroy whatever basis the Union still might have had for its claim, Parker wrote to Claude<sup>5</sup> defining the functions of "Assistant Managers (at the present time your son Ron)" in a manner that would make it appear as if they were supervisors and thus were excluded from the application of the Act.

<sup>&</sup>lt;sup>1</sup> The relevant docket entries are as follows: The charge was filed on December 3, 1980; the complaint issued on January 13, 1981; and the hearing was held on February 23, 1981, in St. Louis, Missouri.

<sup>2</sup> All dates set forth herein refer to the year 1980, unless otherwise stated.

<sup>&</sup>lt;sup>3</sup> The Union represents solely projectionists. It is the bargaining representative at all of Respondent's other 22 theaters in the St. Louis area

<sup>4</sup> Claude testified that this conversation took place 3 or 4 weeks prior to Hollander's termination, which would place it somewhere between October 23 and 30. Because of Respondent's unusual and precipitate actions, I find that the conversation occurred closer to October 30, or at least after Respondent had received the Union's demand letter.

<sup>5</sup> This letter as well as the one prepared for transmittal to Hollander were hand delivered to Claude by special courier, who would not deliver the documents to anyone but Claude. Never before had Respondent communicated with Claude in this manner.

The discharge of Hollander without any reason and Respondent's definition of the terms of employment of the other employees could have meaning only in light of the Union's demand for recognition. Although Hollander's union adherence was not directly known to Respondent (other than to Claude, who in this instance was aligned with the interests of the employees), Respondent knew that there were union activities being engaged in. That is sufficient knowledge in these circumstances.

Third, Respondent contends that, at all of its other theaters, the Union has been recognized as its employees' bargaining agent and that there have been amicable labor relations, without union animus, throughout its operations. However, the precipitate discharge of Hollander cannot be easily explained consistent with a lack of animus. The discharge was the *coup de grace* which was intended to discourage employees from supporting the Union.

The General Counsel argues that this single discharge is sufficient to support a bargaining order under N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969), which dictates that the Board weigh the quality and quantity of the violations in order to decide whether their lingering effects can be cured by the relief which the Board normally grants in the circumstances (here, backpay, reinstatement, and a notice, with the Union having the right to petition for an election) or whether the interests of the Act are better served by utilizing the cards signed by a majority of employees in the appropriate unit as proof of the Union's majority status. Before proceeding to any other issue it must be determined whether the Union had such a majority, the appropriate unit being stipulated herein as:

All projection employees employed by the Respondent at its De Soto, Missouri, Melba Theatre and Skyvue Drive-In facilities, excluding office clerical and professional employees, guards, and supervisors as defined in the Act and all other employees.

The record shows that there were at least five projectionists during the year preceding the Union's demand, one of whom, Claude, was admittedly a supervisor. Another was Claude's second son, Mike, as to whom the record shows declining employment since early summer 1980 when Mike first indicated to Claude that he had another job and, later, when Mike stated that he would work as a projectionist only if absolutely necessary. That statement led to the hiring of Hollander and from October to December 1980 Mike worked only 1 night. I find that Mike removed himself from regular employment and was, at the time of the union demand, only the most casual of employees. He may not be included within the appropriate unit.

Another employee, Keith Singer, although employed five or six shifts weekly in the summer, left for college in

September. Thereafter, he worked some weekends and over the Christmas holidays. Claude could recall only that he "worked several times" but could not remember how many. The general Board rule is that "college students who perform full-time unit work during the summer months as well as part-time unit work on a regular basis during the remainder of the year are to be included in the unit. . . The determinative criteria as to whether students are to be included in a unit appears to be the regularity of their part-time employment [which may be as little as I day per week.]" Century Moving & Storage, Inc., 251 NLRB 671, 681 (1980), and cases cited therein. Although I am satisfied that Singer was an employee during the summer, he maintained no regularity of employment once he went to college and worked only sporadically thereafter. He is not an employee within the appropriate unit.7

These findings leave two employees within the unit, Ron and Hollander, both of whom signed cards authorizing the Union to act as their collective-bargaining agent. Respondent argues, however, that the cards are tainted because of Claude's participation in their signing. However, in *El Rancho Market*, 235 NLRB 468, 473–474 (1978), enfd. 603 F.2d 223 (9th Cir. 1979), the Board stated:

This Board has long recognized that a supervisor's involvement in organizational activities will taint a union's card majority only where the supervisor's participation may be said to have deprived employees of the opportunity to exercise free choice in selecting a collective-bargaining representative. In explicating this principle, [The Board has] pointed out that at a minimum it must be affirmatively established either that the supervisor's activity was such as to have implied to employees that their employer favored the union or that there is cause for believing that employees were coercively induced to sign authorization cards because of fear of supervisory retaliation.

Although the precise nature of the events which gave rise to the attempt of Claude and the two employees to seek the aid of the Union was not fully elicited, apparently there was some dispute about the reduction of their wages, which caused Claude and the employees to be equally upset. The three of them were, therefore, taking sides against Respondent and there is no cause for belief in this record that either Ron or Hollander were fearful of retaliation from Ron's father.

Having found, therefore, that the unit consists of two employees, both of whom signed cards, I find and conclude that the Union represented, as of October 22, an uncoerced majority of Respondent's employees and that Respondent violated Section 8(a)(5) and (1) of the Act

<sup>&</sup>lt;sup>6</sup> No payroll records were introduced in evidence. This finding is based on the testimony of Claude, who recalled that Mike received a paycheck in December and was unable to remember if Mike worked in October and November. If he had additional and regular employment, surely Respondent would have produced evidence to that effect.

<sup>&</sup>lt;sup>7</sup> Respondent's authorities in support of a contrary result are distinguishable. Here, Singer removed himself from regular employment because of his attendance at college; Mike, because of his own personal desires. As a result, neither had regularity of employment nor availability for regular or even irregular employment opportunities. Furthermore, that both worked sporadically is attributable solely to the unavailability for work of Hollander, who had been discharged.

by refusing to recognize the Union and to bargain with it. Instead, by terminating the employment of Hollander, Respondent discharged one-half of its employees, resulting in a unit of one employee, which the Board has long held cannot constitute an appropriate bargaining unit. Further, as noted above, Respondent made a concerted effort to remove even Ron from the unit by designating him a supervisor. I am not persuaded that he is such. Rather, he is primarily a projectionist who has some duties during the periods of time Claude is not present at one of the two theaters. However, Claude is on call, 24 hours a day; and, in agreement with the General Counsel, I find that Ron has no actual supervisory responsibilities. Pacific Drive-In Theatres Corp., 167 NLRB 661 (1967); Sameric Corporation, 253 NLRB 345 (1980).

In these circumstances, the termination of one of two employees within the unit is most effective in destroying election conditions for a long period of time, and I find that the lasting impact cannot be mitigated by anything short of a bargaining order. Occidental Paper Corporation, 227 NLRB 719 (1977). The impact of Respondent's actions could hardly be misunderstood by Hollander, upon his return to employment, or by Ron, who may be well aware that his union activities may well be a threat to his and his father's livelihood. In the circumstances, the employee sentiment demonstrated by the union authorization cards is better protected by the issuance of a bargaining order, effective as of November 20, 1980, the date on which Respondent discharged Hollander. Cas Walker's Cash Stores Inc., 249 NLRB 316, fn. 3 (1980). Furthermore, because I have found Respondent's violation to be egregious, I shall also recommend the issuance of a broad cease-and-desist order. Hickmott Foods, Inc., 242 NLRB 1357 (1979).

In addition, having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act. Specifically, I shall recommend that Respondent be ordered to offer Richard Hollander reinstatement to his former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered since the date of his discharge, computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in Florida Steel Corporation, 231 NLRB 651 (1977).8

# THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, occurring in connection with Respondent's operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to

lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER9

The Respondent, Wehrenberg Theatres, Inc., d/b/a Melba Theatre and Skyvue Drive-In, De Soto, Missouri, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Discouraging membership of its employees in or support of the Union, or any other labor organization, by discharging any of its employees or discriminating in any manner in respect to their hire and tenure of employment or any term or condition of employment, in violation of Section 8(a)(3) of the Act.
- (b) Refusing to recognize or bargain collectively with the Union as the exclusive bargaining representative of all employees in the unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment:

All projection employees employed by Respondent at its DeSoto, Missouri, Melba Theatre and Skyvue Drive-In facilities, excluding office clerical and professional employees, guards, and supervisors as defined in the Act and all other employees.

- (c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Offer to Richard Hollander immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole in the manner provided above for any loss of pay he may have suffered from the date of his unlawful discharge, until the date of such offer of reinstatement.
- (b) Upon request of the Union, bargain collectively with it as the exclusive representative of all of Respondent's employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.
- (c) Preserve and, upon request, make available to the board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.
- (d) Post at Respondent's places of business at De Soto, Missouri, copies of the attached notice marked "Appen-

<sup>&</sup>quot;See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). In connection with compliance with this Decision, I credit Ron's testimony that, while only Melba was operating, he and Hollander would have alternated their duties as projectionists.

<sup>&</sup>lt;sup>9</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

dix."10 Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by

Respondent for 60 consecutive days thereafter, in conspicuous places, including any places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>&</sup>lt;sup>10</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"